SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
GROUNDS ON WHICH JURISDICTION IS INVOKED	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. Proceedings in the United States District Court and Court of Appeals	5
B. General Summary of the Facts	5
C. Facts Relating to Failure to Interpret Witness Oath	7
D. Facts Relating to Required Disclosure of Communication by Defendant to his Attorney	7
ARGUMENT:	8
POINT I. FAILURE OF WITNESSES TO UNDERSTAND WITNESS OATH REQUIRES NEW TRIAL WHERE DEFECT NOT DISCOVERED UNTIL AFTER VERDICT	8
A. Preliminary Statement	8
B. Decision of Court of Appeals is Contrary to General Rule of Federal and State Courts That Failure of Witness to be Sworn Requires New Trial Where Defect First Discovered After Trial	9
C. Conclusion	11

INDEX *(Continued)*

PAGE

POINT II. COURT OF APPEALS' DECISION VIOLATES RULE RELATING TO CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION 11

A. Preliminary Discussion — Court of Appeals' Decision is Contrary to Decisions of this Court 11

B. Decision Contravenes Basic Purpose of Attorney-Client Privilege 12

C. Basis of Court of Appeals' Decision is Unsupportable Distinction Between Facts and Suggestions 13

D. Decision of Court of Appeals Undermines Defendant's Constitutional Right to Counsel 13

E. Required Disclosure Was Extremely Prejudicial 14

F. Court of Appeals' Decision is Unprecedented 14

POINT III. CONCLUSION 15

PAGE

TABLE OF CASES

Alexander vs. United States, 138 U. S. 353, 34 L. Ed. 954, 11 Sup. Ct. 350 12

Barr vs. State (Mississippi) 23 So. 628 9

Beausoliel vs. United States, 107 F. 2d 292 10

Blackburn vs. Crawford's Lessee, 70 U. S. 175, 192, 193, 18 L. Ed. 186, 193 ..... 12, 13

Chirak vs. Reinicker, 24 U. S. 280, 294, 6 L. Ed. 474, 477 12

Gibbons vs. Territory (Criminal Court of Appeals of Oklahoma) 115 Pac. 129 9

Glasser vs. United States, 315 U. S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680 14

Hawks vs. Baker, 6 Me. (Greenleaf), 72 ..... 9, 10

Langford vs. United States, 76 S. W. 111 (Court of Appeals of the Indian Territory) 9, 10

Lo Toon vs. Territory, 16 Haw. 351, 356 ..... 9, 10

Napiearlski vs. Pickering, 278 App. Div. 456, 106 N. Y. Supp. 2d 28 (1951) 9

People vs. Fisher, 182 App. Div. 301, 169 N. Y. S. 729, reversed on other grounds, 223 N. Y. 459, 119 N. E. 845 ..... 9, 10

State vs. Lugar, 115 Ia. 268, 88 N. W. 333 ..... 9, 10

State vs. Taylor, 57 W. Va. 228, 50 S. E. 247 9

Stoppick vs. Goldstein, 174 App. Div. 306, 160 N. Y. S. 947 9

TEXT BOOKS

PAGE

39 Am. Jur. (New Trial) Sec. 32, p. 55 ..... 9, 10

Annotated Cases 1912D, p. 572 9

23 C. J. S. (Criminal Law) Sec. 1439, p. 1145 9

VIII Wigmore on Evidence, 3rd Ed., Sec. 2311 12

PROVISIONS OF CONSTITUTION AND STATUTES

Amendment VI of the United States Constitution 13

8 U. S. C., Sec. 1324 (a) 5

28 U. S. C., Sec. 1254 (1) 2

Supreme Court of the United States

OCTOBER TERM, 1955

No.....

BUCK WILCOXSON,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, BUCK WILCOXSON, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the order of the United States Court of Appeals for the Tenth Circuit dated and entered in this case on February 20, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is shown in the Record for that Court which has been filed herein at pages 14 to 28 inclusive. This opinion is unreported. The opinion for the Court of Appeals for the Tenth Circuit has not yet been reported

but appears in the Transcript of Record filed herein at pages 3 to 12 inclusive. A printed copy thereof appears in the Appendix of this Petition. No opinion was rendered by the Court of Appeals denying the Petition for Rehearing.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Order and Judgment of the Court of Appeals affirming the Judgment of the District Court was dated and entered on February 20, 1956, (Rec. 13). The Petitioner's Petition for Rehearing was filed in the Court of Appeals March 1, 1956, (Rec. 33). The Order and Judgment of the Court of Appeals denying the Petition for Rehearing was dated and entered on March 8, 1956, (Rec. 34). The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the conviction rest upon the unsworn testimony of the two chief prosecuting witnesses?

2. Was it a violation of the attorney-client privilege and the Sixth Amendment to the United States Constitution to compel the defendant to testify at the trial about suggestions made by the defendant to his attorney during a preliminary hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved:

Sixth Amendment to the Constitution of the United States:

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

28 U. S. C., Sec. 1254:

"Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

8 U. S. C., Sec. 1324 (a):

"Bringing in and harboring certain aliens; persons liable; authority to arrest

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

"(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in

the United States, by any means of transportation or otherwise;

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of— any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

STATEMENT OF THE CASE

A. *Proceedings in the United States District Court and Court of Appeals*

On February 17, 1955, the petitioner, defendant-appellant, Buck Wilcoxson, hereinafter sometimes referred to as the defendant, was indicted by the grand jury in the United States District Court for the District of New Mexico in two counts which charged him with transporting Inocente Ortiz and Herminio Porras into and through the State of New Mexico on or about December 5, 1954, with knowledge that each was an alien whose last entry into the United States was less than three years prior thereto in violation of 8 U. S. C., Sec. 1324 (Rec. 3, 4). Upon a plea of not guilty (Rec. 4, 31), the case was tried to a jury (Rec. 32). The Court overruled the defendant's motions for judgment of acquittal (Rec. 87 to 89, 244, 336), and submitted the case to the jury, which convicted the defendant on both counts (Rec. 7). Following the verdict defendant filed a motion for judgment of acquittal or in the alternative for a new trial (Rec. 7, 8), which was overruled in its entirety (Rec. 14, 28). The defendant was sentenced to imprisonment for eighteen months and a $500 fine on the first count and three years' imprisonment and a $500 additional fine on the second count (Rec. 12, 13), from which he appealed to the United States Court of Appeals for the Tenth Circuit (Rec. 14) seeking reversal of the judgment. The Court of Appeals in a two-to-one split decision affirmed the conviction (Rec. 3 to 12, 13). Defendant's Petition for Rehearing was denied by the Court of Appeals (Rec. 34).

B. *General Summary of the Facts*

The defendant is a rancher who has conducted his ranching operations and has resided near Grants, New

Mexico, since 1930 (Rec. 166). On December 4, 1954, the defendant and his wife made a trip to the Sparks' ranch in Texas to visit some friends (Rec. 167). The Sparks' ranch in Texas parallels the Rio Grande River, which forms the boundary at that point between the United States and Old Mexico (Rec. 39).

The Government's two prosecuting witnesses, Inocente Ortiz and Herminio Porras, contended that the defendant met them during the afternoon and evening on the River Road by the side of the Rio Grande River; that he caused them to cross into the United States from Mexico; that they told him they were Mexican citizens but the defendant nevertheless hired and transported them to Grants, New Mexico (Rec. 39, 43, 44, 45, 66, 67, 68).

The defendant's evidence with regard to the meeting with the two prosecuting witnesses showed: that the defendant did not meet these witnesses on the River Road at the Rio Grande River as contended by the prosecution (Rec. 177); that defendant and his friend went to a maintenance shop on the Sparks' ranch on the evening of December 4 to tell a Federal cattle quarantine inspector that they had found the inspector's dog (Rec. 168, 169, 221); that while at the shop the defendant and his friend were approached by the two prosecuting witnesses, Inocente Ortiz and Herminio Porras, who asked the defendant for employment (Rec. 169, 170, 222); that the two prosecuting witnesses were questioned by the defendant about their citizenship and they replied that they were American citizens who lived at Esperanza, Texas, (Rec. 169, 222); that after negotiations for employment the defendant hired them (Rec. 171); that at no time prior to their arrest did the defendant know or believe that the two prosecuting witnesses were Mexican citizens (Rec. 177).

Defendant's contention that he met the witnesses at the shop on the ranch, away from the border in the manner set forth above was corroborated (Rec. 161, 162, 165, 224, 155-157) by two impartial Federal agents, who were cattle quarantine inspectors for the United States Department of Agriculture (Rec. 152, 217), and who were not acquainted with the defendant (Rec. 158, 159, 222, 225).

C. *Facts Relating to Failure to Interpret Witness Oath*

At the beginning of the trial the Court asked the attorneys for the plaintiff and defendant to call their respective witnesses; the two chief prosecuting witnesses, Herminio Porras and Inocente Ortiz, were called by the attorneys for the Government as witnesses for the prosecution; these two witnesses came forward to the front of the Courtroom, raised their right hands along with the other witnesses and the witness oath was recited to all the witnesses as a group in the English language; the oath was not interpreted to these two witnesses in Spanish either at that time or at any other time during the trial (Rec. 30). This defect was not called to the attention of the Court at any time during the trial until it was raised by motion for a new trial for the reason that neither Mr. Robb nor Mr. Dickason, the two attorneys for the defendant, nor the defendant himself, were aware of this defect until after the trial (Rec. 9, 11). The evidence in the Record is undisputed that neither of the two prosecuting witnesses could understand the English language (Rec. 50, 70, 71, 74, 128). All of their testimony was in fact given through an interpreter during the trial (Rec. 38, 66).

D. *Facts Relating to Required Disclosure of Communication by Defendant to his Attorney*

At the preliminary hearing prior to the trial the defendant was assisting his attorneys in conducting the hear-

ing and was making suggestions and disclosures to them during their questioning of the two prosecuting witnesses, Herminio Porras and Inocente Ortiz (Rec. 178-182). During this hearing the defendant suggested that his attorney ask the witness Herminio Porras several questions concerning the alleged trip in the defendant's car along the River Road from the home of Herminio Porras to the Home of Inocente Ortiz (Rec. 178-182). At the trial the Court required the defendant to answer questions by the United States Attorney as to what disclosures he had made to his attorneys at the preliminary hearing pertaining to the above matters (Rec. 178-182). The objections to these questions by the defendant's attorneys on the ground of attorney-client privilege were overruled (Rec. 178, 179, 181, 182).

ARGUMENT

POINT I. Failure of Witnesses to Understand Witness Oath Requires New Trial Where Defect Not Discovered Until After Verdict

A. *Preliminary Statement*

The trial Court overruled (Rec. 28) the defendant's motion for a new trial (Rec. 7, 8), which was based upon the defendant's contention that the witness oath was administered to the two chief prosecuting witnesses in a language they could not understand (Rec. 7, 8). The Court of Appeals in a two-to-one decision affirmed the judgment on the ground that there was a waiver of the defect by failure to object thereto at the trial (See Appendix, page 10) notwithstanding that it is undisputed that neither the defendant nor his attorneys were actually aware of the omission until after the trial (Rec. 9, 11). Circuit Judge Murrah dissented on this point (See Appendix, page 12). The facts

relating to this point are set forth under the statement of the case at page 7 supra.

This decision is contrary to the decisions of Federal Courts as well as to the general rule. It represents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court has never passed upon the question raised by this petition. However, the decision involves questions of Federal law which should be settled by this Court.

B. *Decision of Court of Appeals is Contrary to General Rule of Federal and State Courts That Failure of Witness to be Sworn Requires New Trial Where Defect First Discovered After Trial*

The general rule, supported by the overwhelming weight of authority, is that the failure to administer the oath to a witness for the prosecution in a criminal case requires a new trial where the defect was not known to either the defendant or his attorneys until after the trial and where the question is raised by motion for new trial in the trial Court (23 C. J. S. (Criminal Law) Sec. 1439, p. 1145; 39 Am. Jur. (New Trial) Sec. 32, p. 55; Annotated Cases 1912D, p. 572; *Hawks vs. Baker*, 6 Me. (Greenleaf), 72;*Gibbons vs. Territory* (Criminal Court of Appeals of Oklahoma), 115 Pac. 129; *Langford vs. United States*, 76 S. W. 111 (Court of Appeals of the Indian Territory); *Lo Toon vs. Territory*, 16 Haw. 351, 356; *State vs. Taylor*, 57 W. Va. 228, 50 S. E. 247; *State vs. Lugar*, 115 Ia. 268, 88 N. W. 333; *Barr vs. State* (Mississippi) 23 So. 626; *Napiearlski vs. Pickering*, 278 App. Div. 456, 106 N. Y. Supp. 2d 28 (1951); *Stoppick vs. Goldstein*, 174 App. Div. 306, 160 N. Y. S. 947; *People vs. Fisher*, 182 App. Div. 301, 169 N. Y. S. 729, reversed on other grounds, 223 N. Y. 459, 119

N. E. 845). The only Federal cases passing on this point support this rule *(Langford vs. United States,* 76 S. W. 111 (Court of Appeals of the Indian Territory); *Lo Toon vs. Territory,* 16 Haw. 351, 356).

Because of the importance of the rule that a defendant in a criminal case shall be tried only upon sworn testimony, it is held in this line of cases that there is no waiver of the omssion unless the defendant or his attorneys actually knew of the defect at the time and failed to object thereto *(Hawks vs. Baker,* 6 Me. (Greenleaf), 72; *People vs. Fisher,* 182 App. Div. 301, 169 N. Y. S. 729, reversed on other grounds, 223 N. Y. 459, 119 N. E. 845; cf. 39 Am. Jur. (New Trial) Sec. 32, p. 55; *Langford vs. United States,* 76 S. W. 111 (Court of Appeals of the Indian Territory).

Although nearly all of the above cases involved a complete failure to administer an oath, as distinguished from administering the oath in a language not understood by the witnesses, there is essentially no difference between the two situations since the basic purposes of the oath are (1) to bind the conscience of the witness and (2) to make him subject to perjury if the testimony is false (See *State vs. Lugar,* 115 Ia. 268, 88 N. W. 333). These purposes are defeated in either case. The only case similar on its facts to the instant one involving the failure to interpret the oath to a witness is *People vs. Fisher,* 182 App. Div., 301, 169 N. Y. S. 729, reversed on other grounds, 223 N. Y. 459, 119 N. E. 845, which supports petitioner's position.

The bare majority of the Court of Appeals cited numerous cases which are claimed to support their decision including *Beausoliel vs. United States,* 107 F. 2d 292 (See Appendix, p. 10). All except four of these cases are distinguishable on one or more of the following grounds:

1. Either the Record or the Court's opinion did not

show when the omission was first discovered by the appellant, or

2. The Record affirmatively showed that the appellant actually knew of the defect during the trial, or

3. The objection was raised for the first time on appeal rather than by motion for new trial in the Trial Court, or

4. The decision was rendered in a civil, as distinguished from a criminal case, or

5. The Record did not definitely show that the witness had not been sworn.

C. *Conclusion*

The Court of Appeals of the Tenth Circuit thus has deprived this defendant of one of the most fundamental rights known to our system of jurisprudence upon a theory rejected by Federal and State Courts alike. The decision has created a conflict in the Federal decisions concerning a basic proposition which should be resolved by this Court. The importance of failing to observe the usual course of judicial proceedings in this case is forcefully illustrated by the fact that there is overpowering evidence that the two chief prosecuting witnesses, who were not sworn, did in fact give false testimony (See Statement of Case, p. 6, 7 supra).

POINT II. Court of Appeals' Decision Violates Rule Relating to Confidential Communications Between Attorney and Client and the Sixth Amendment to the United States Constitution

A. *Preliminary Discussion—Court of Appeals Decision is Contray to Decisions of this Court*

The Court of Appeals affirmed (See Appendix, p. 2)

the ruling of the United States District Court (Rec. 178, 179, 181, 182) overruling defendant's objections that he was not required to divulge at the trial suggestions made by him to his attorney during the preliminary hearing. The basis of the Court of Appeals' ruling was that the communication was intended to be disclosed by the attorney and thus was not confidential within the rule extending a privilege to confidential communications between attorney and client (See Appendix, p. 6). Although this Court has never passed upon the precise question raised under this point, the decision of the Court of Appeals is in direct conflict with the principles governing the attorney-client privilege as announced by this Court (See *Blackburn vs. Crawford's Lessee*, 70 U. S. 175, 192, 193, 18 L. Ed. 186, 193; *Chirak vs. Reinicker*, 24 U. S. 280, 294, 6 L. Ed. 474, 477; *Alexander vs. United States*, 138 U. S. 353, 34 L. Ed. 954, 11 Sup. Ct. 350). This decision is a startling departure from the accepted and usual course of judicial proceedings. It is a novel, unwarranted and dangerous limitation of the privileged communication rule.

B. *Decision Contravenes Basic Purpose of Attorney-Client Privilege*

The two basic factors in determining whether a communication to an attorney is confidential within the meaning of the attorney-client privilege are whether or not (1) the client intended that it be so and (2) it is necessary to preserve the client's freedom of consultation. Where both of these factors are present it is generally held that the communication is privileged (VIII Wigmore on Evidence, 3rd Ed., Sec. 2311). Suggestions as to the handling of the case by the lawyer are plainly intended to be confidential. Because the client often has superior knowledge of the facts and circumstances surrounding his case, his suggestions are just as necessary to the lawyer in adequately prosecuting

the case as are facts. Thus, the communication of a suggestion, as distinguished from a specific fact, meets both tests of confidentiality set forth above. To strip such communications of their privacy would defeat the basic purpose of the privilege which is to assure complete disclosure without fear of reprisals in order to assure every person adequate representation (See *Blackburn vs. Crawford's Lessee*, 70 U. S. 175, 192, 193, 18 L. Ed. 186, 193).

C. *Basis of Court of Appeals' Decision is Unsupportable Distinction Between Facts and Suggestions*

There is no basis for distinguishing for this purpose between facts and suggestions on the theory that the client intends that the suggestion, but not the fact, be made public. Such a distinction is implicit in the Court of Appeals decision (See Appendix, p. 6). The client obviously means that each shall be made public in the sense that each is to be used by the lawyer as a basis for asking questions and conducting the trial. Plainly the privilege is not destroyed where the lawyer uses facts disclosed by the client as a basis for asking questions. Yet this would seem to follow from the decision by the Court of Appeals.

D. *Decision of Court of Appeals Undermines Defendant's Constitutional Right to Counsel*

The decision of the Court of Appeals strikes a direct blow at the fundamental right guaranteed by the Sixth Amendment of the United States Constitution that a defendant in a criminal case has the right to "assistance of counsel." This Court has held that this guarantee means effective and untrammeled assistance of counsel (cf. *Glasser*

vs. United States, 315 U. S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680). As discussed under Point II (B) supra this decision deprives the client of the right to make suggestions to his attorney during the trial which unquestionably are necessary to obtain effective assistance of counsel.

E. *Required Disclosure Was Extremely Prejudicial*

The required disclosure was extremely prejudicial because it permitted the jury to draw the damaging inference that the defendant must have met the prosecuting witnesses at the border on the River Road under the circumstances to which they testified, rather than at the shop on the Sparks' ranch (See Statement of Case, p. 6).

F. *Court of Appeals' Decision is Unprecedented*

The Court of Appeals cites several cases which allegedly support its decision (See Appendix, p. 7). Nearly all of these cases concern offers of settlement communicated by the client to the lawyer for the purpose of transmission to others. Clearly these cases are distinguishable on the ground that there the client intends the lawyer to communicate his demands or offers to others. None of the cases cited involved the communication of suggestions by the client during the course of a hearing for the purpose of assisting the lawyer in the trial. The principle that communications intended by the client to be made public are not privileged has never been extended to suggestions made by the client to the attorney during a hearing. So far as ascertainable by counsel, such communications have been so uniformly regarded as being inherently privileged that no one has sought to

dispute their protection under the attorney-client privilege rule.

POINT III. Conclusion

The decision of the Court of Appeals for the Tenth Circuit in this case is unprecedented, is contrary to the decisions of this Court and of other Federal Courts, strikes down fundamental rights guaranteed by the common law and the Constitution of the United States and sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It is respectfully requested that the petition be granted and the writ issued.

Buck Wilcoxson, *Petitioner*

By Rodey, Dickason, Sloan, Mims & Akin
John D. Robb, *Esquire*, of counsel
First National Bank Building
Albuquerque, New Mexico

APPENDIX

EXHIBIT "A"

Judgment and Commitment and Order of Probation

On this 25th day of March, 1955 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of illegal transportation of aliens in the United States in violation of Section 1324, Title 8, United States Code as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, an no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months under Count I of the Indictment, and for a period of Three (3) Years under count II of the Indictment, and that he do pay unto the United States of America a fine in the sum of $500.00 under each of the two counts of the Indictment, a total fine of $1000.00, and that he stand committed until the fines shall have been paid in full or until otherwise discharged by operation of law; Provided, However, that the execution of the prison sentence under count II of the Indictment shall be, and it hereby is, suspended, and that the defendant be, and he hereby is, placed on probation for a period of Three (3) Years under said count II, which probationary period shall begin and run immediately upon the execution and completion of the

sentence under count I of the Indictment, and shall be upon the condition that the defendant shall conduct himself in all respects as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Carl A. Hatch
United States District Judge.

Filed March 25, 1955.

EXHIBIT "B"

Judgment.

Sixty-third Day, November Term, Monday, February 20th, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Buck Wilcoxon, appellant, surrender himself to the custody of the United States Marshal for the District of New Mexico, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

EXHIBIT "C"

Order denying petition for rehearing.

Seventieth Day, November Term, Thursday, March 8th, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and same is hereby denied.

EXHIBIT "D"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

November Term - 1955

BUCK WILCOXON,

Appellant,

vs. NUMBER 5156

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

Don L. Dickason and John D. Robb (Rodey, Dickason, Sloan, Mims and Akin was with them on the brief) for Appellant.

Paul F. Larrazolo, United States Attorney, (Melvin L. Robins, Assistant United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and MURRAH, Circuit Judges.

BRATTON, Chief Judge:

The indictment in this case containing two counts laid charges under 8 U.S.C. §1324. The first count charged that Buck Wilcoxon transported Inocente Ortiz, an alien, into and through the State of New Mexico, the accused then and there knowing that the person being tranported was an alien who had entered the United States in violation of law, and further knowing that the last entry of such alien into the United States occurred less than three years prior to the time of the transportation. And the second count charged like transportation of Herminio Porras, an alien. The defendant was found guilty on both counts; was sentenced to imprisonment on the first count; was sentenced to imprisonment on the second count, with provision that the sentence be suspended and the defendant placed on probation; and was sentenced to pay a fine on each count. Aggrieved, the defendant brought the case here on appeal.

The judgment is challenged for want of substantial evidence to sustain the conviction. The evidence presented sharp conflicts. But in the trial of the conventional criminal case it is the province and function of the jury to observe the witnesses, to appraise their credibility, to weigh their testimony, to draw reasonable inferences from established facts, to resolve conflicts, and to determine the ultimate question whether the guilt of the accused has been established beyond a reasonable doubt. And on appeal from a conviction, the scope of review is limited to determining whether there was substantial evidence to support the verdict. Carlson v. United States, 187 F.(2d) 366 certiorari denied, 341 U. S. 940; Kelling v. United States, 193 F.(2d) 299; Lunsford v. United States, 200 F.(2d) 237. Viewed in the light of that frequently reiterated general rule, we think it is clear that the evidence adequately sustains the conviction.

The judgment is challenged on the further ground that the court erred in requiring appellant to disclose the substance of certain confidential communications between himself and his attorney. During his cross examination, appellant was asked whether in the course of the preliminary hearing upon the charges later embodied in the indictment in this case, he directed his attorney to propound certain questions to a witness for the Government. Appellant admitted that he directed his attorney to ask the questions; that his attorney propounded the questions to the witness; and that the purpose in giving such directions to his attorney was to ascertain how far the witness would go in testifying to untruths. It is the general rule of ancient origin that confidential communications between attorney and client in the course of professional employment are privileged and cannot be used in evidence against the client. The rule is for the protection of the client in order that he may be free to disclose to his attorney matters of confidence and importance without fear that the trust will be violated. But the fact that a communication is made to an attorney does not necessarily under any and all circumstances make it privileged. In order to be privileged, a communication must be made in confidence of the relationship and under circumstances from which it may reasonably be presumed that it will remain in confidence. The protection does not extend to a communication which cannot properly be termed the subject of a confidential disclosure. And a statement or communciation made by a cilent to his attorney with the intent and purpose that it be communicated to others is not privileged. In directing his attorney to propound the questions to the witness, it was the intent and purpose of appellant that the substance of such directions would be immediately repeated to the witness in the form of questions. It is manifest that in such circumstances, the

directing of the attorney to ask the questions did not constitute a confidential communication within the purview of the general protective rule. Himmelfarb v. United States, 175 F.(2d) 924, certiorari denied, 338 U. S. 860; Rousseau v. Bleau, 131 N. Y. 177, 30 N. E. 52; Spencer v. Burns, 413 Ill. 240, 108 N. E. (2d) 413; Howsley v. Clark, 167 Okl. 371, 29 Pac.(2d) 947; Hill v. Hill, 106 Colo. 492, 107 Pac.(2d) 597; Baum v. Denn, 187 Ore. 401, 211 Pac.(2d) 478; Solon v. Lichtenstein, 39 Cal.(2d) 75, 244 Pac.(2d) 907; In re Munsell's Guardianship, 239 Iowa 307, 31 N. W.(2d) 360.

Error is predicated upon asserted improper limitation of the cross examination of a certain witness for the Government. Cross examination is a right, not a mere privilege granted or withheld at the will of the court. But the extent of cross examination of a witness in respect to an appropriate subject of inquiry rests largely in the sound judicial discretion of the trial court. The discretion is to be exercised with due regard for the particular facts and circumstances. And the exercise of such discretion will not be disturbed on appeal unless it was clearly abused. Alford v. United States, 282 U. S. 687; Glasser v. United States, 315 U. S. 60; Rose v. United States, 128 F.(2d) 622; certiorari denied, 317 U. S. 651; Dickson v. United States, 182 F.(2d) 131. Without recapitulating the proceedings which give rise to the contention, it suffices to say that a painstaking examination of the record convinces us that no abuse of discretion occurred in connection with the cross examination of the witness and therefore the contention is without sustainable basis.

The remaining contention for consideration is that the action of the court in refusing to grant a new trial on the ground that two witnesses for the Government testified

without the oath having been interpreted to them in Spanish constituted reversible error. The contention is argued on the assumed premise that the situation was tantamount in law to the witnesses giving testimony without the oath being administered to them in any form; and, without so deciding, the contention may be considered in that manner. Prior to the introduction of any evidence, the witnesses for the Government and those for the appellant were called. Upon being called, they came forward and the clerk administered the oath to them all together. Inocente Ortiz and Herminio Porras were among those to whom the oath was administered in that manner. The oath was not interpreted into the Spanish language. When Ortiz and Porras testified the questions and answers were interpreted from English into Spanish and from Spanish into English. Without any reference being made to the failure to interpret into Spanish the oath to such witnesses, each stated generally in the course of his testimony that he did not speak English. One ground of the motion for new trial was the failure to interpret to such witnesses the oath in Spanish. Affidavits of appellant and his two attorneys were attached to the motion. In such affidavits, it was stated that at no time during the trial were the affiants aware of the fact that the oath was not interpreted to the two witnesses in Spanish. In the affidavit of one of the attorneys, it was further stated in substance that the first time the matter occurred to him was on the third day after completion of the trial. The failure to interpret the oath into Spanish was first called to the attention of the trial court in the motion for new trial. No reference was made to it prior to that juncture of the proceedings. The two-fold purpose of the oath is to bind the conscience of the witness and make him amenable to prosecution if he gives perjured testimony. But the administering of the oath to a witness may be waived.

It is to be observed that the motion for new trial for failure to interpret into Spanish the oath to the two witnesses was not predicated upon knowledge obtained after completion of the trial. Appellant knew the two witnesses prior to the time the oath was administered to them. He and his attorneys knew that the witnesses did not speak English sufficiently to carry on a conversation or testify in that language. He and his attorneys were present when the oath was administered to the witnesses. The failure to interpret the oath into Spanish to the two witnesses in question occurred in the presence of appellant and his attorneys. But the attention of the court was not called to it. Neither was the attention of the court directed to the omission by objection or otherwise at the time the two witnesses were placed on the stand and gave their evidence. Appellant and his attorneys remained silent in respect to it. And the witnesses were subjected to extended cross examination covering a wide range. But it is argued that after completion of the trial, one of the attorneys realized for the first time that the oath was not interpreted to such witnesses. In other words, it is said in substance that due to an awakened mental realization the attorney realized for the first time after the completion of the trial that the oath had not been interpreted to the two witnesses. Being present, it was the duty of appellant and his attorneys to take notice of the several steps in the proceedings. People v. Krotz, 341 Ill. 214, 172 N. E. 135; Smith v. State, 81 Ga. 479, 8 S. E. 187. And that duty included notice of the manner in which the oath was administered to the witnesses. Appellant and his attorneys could not stand by quiescently and urge later that after completion of the trial they realized for the first time that the witnesses testified without the oath having been interpreted to them. Appellant waited too long to complain that the oath was not interpreted to such witnesses.

By failing to bring the matter to the attention of the trial court in some manner until after completion of the trial, he effectively waived the right to seek a new trial on that ground. Beausoliel v. United States, 107 F.(2d) 292; State v. Hope, 100 Mo. 347, 13 S. W. 490; Goldsmith v. State, 32 Tex. Cr. 112, 22 S. W. 405; Moore v. State, 96 Tenn. 209, 33 S. W. 1046; Barnes v. State, 61 Tex. Cr. 37, 133 S. W. 887; St. Louis Iron Mountain & Southern Railroad Co. v. Hairston, 125 Ark. 314, 188 S. W. 838; Messer v. State, 57 Okl. Cr. 38, 47 Pac.(2d) 218; Murphy Mortgage Co. v. Epp, 99 Kan. 706, 162 Pac. 1170; In re Da Roza's Estate, 82 Cal. App.(2d) 550, 186 Pac.(2d) 725; State v. Doud, 190 Ore. 218, 225 Pac.(2d) 400; State v. Whiting, 173 Kan. 711, 252 Pac.(2d) 884; Brenton State Bank v. Heckmann, 233 Iowa 682, 7 N. W.(2d) 813; Pooley v. State, 116 Ind. App. 199, 62 N. E.(2d) 484; State v. Melancon, 163 La. 435, 112 So. 37; Bassett v. Mechanics Bank of New Haven, 116 Conn. 730, 166 Atl. 385.

The judgment is

AFFIRMED.

MURRAH, dissenting.

As this case comes to us, the defendant stands convicted and condemned on the testimony of two witnesses testifying through an interpreter after having taken an oath, the obligation of which they did not comprehend because they did not understand the language in which it was administered.

No one would gainsay the fundamental right of an accused to be convicted only on the oath or affirmation of his accusers. And, "In order that the ceremony of swearing the witness may be effective at all, it is certainly necessary that he understand something of the meaning of it. If he has no such understanding whatever, the form is idle; under such circumstances the witness is not sworn at all in any reasonable sense, or in contemplation of law. If he merely holds up his hand and nods his head in response to the formula propounded him, not understanding that in doing so he has assumed any additional obligation to tell the truth, or risk of punishment should he fail to do so, he has no more bound himself than if he were of unsound mind. The assent he yields, to be effective, must be an intelligent assent, and it cannot be intelligent if he has no idea of the meaning of what he is doing." Lee v. Missouri Pac. Ry Co., 73 P. 110.

It is assumed for the purposes of this case that an oath without understanding is no oath at all, but the conviction is affirmed on the ground of waiver for failure to timely object or bring the matter to the attention of the court. The cited authorities support this view but they take no account of the salutary rule of federal criminal procdure to the effect that plain errors or defects in the trial of a case

affecting substantial rights of the defendant, are noticeable although they are not brought to the attention of the court. Rule 52(b) Federal Rules Criminal Procedure. This rule is in recognition of the inescapable duty of a federal court to see that the trial is "conducted with solicitude for the essential rights of the accused." Glasser v. United States, 315 U. S. 60, 71.

To be sure, the right or privilege, like any other right, may be intelligently waived, but I do not believe that it was deliberately and intelligently waived in this case. These witnesses were sworn enmassee with other witnesses, and admittedly, it did not occur to the court or counsel that they had not been sworn until the third day after the trial of the case. If, through inadvertence or mistake, the witnesses were permitted to testify without an understanding of the sanctity of their oath, it is never too late to correct the error and I should not hesitate to so order it.

This indecorous situation demonstrates the propriety of having the oath administered to each witness after he has taken his place in the witness box. If the oath is to be more than an empty gesture; if it is a pledge to tell the truth with the help of God under penalty of vengeance of the law of God and man, it ought to be done at a time and place and in a manner which befits the sanctity and solemnity of the ceremony. It ought certainly to be done in a manner to bring home to the witness the solemn obligation it imposes. It obviously was not done in this case and I would reverse for a new trial.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:

Alexander v. *United States*, 138 U.S. 353	10
Barnes v. *State*, 61 Tex. Cr. 37, 133 S.W. 887	9
Beausoliel v. *United States*, 107 F. 2d 292	9
Blackburn v. *Crowford*, 3 Wall. 175	10
Brenton State Bank v. *Heckmann*, 233 Iowa 682, 7 N.W. 2d 813	9
Chirac v. *Reinicker*, 11 Wheat. 280	10
Hawks v. *Baker*, 6 Me. (Greenleaf) 72	9
Langford v. *United States*, 4 Ind. T. 567, 76 S.W. 111	9
Moore v. *State*, 96 Tenn. 209, 33 S.W. 1046	9
People v. *Fisher*, 182 App. Div. 301, 169 N.Y.S. 729, reversed, 223 N.Y. 459, 119 N.E. 845	9
St. Louis Iron Mountain & Southern Railroad Co. v. *Hairston*, 125 Ark. 314, 188 S.W. 838	9
State v. *Doud*, 190 Ore. 218, 225 P. 2d 400	9
State v. *Hope*, 100 Mo. 347, 13 S.W. 490	9
State v. *Melancon*, 163 La. 435, 112 So. 37	9

Statute:

Immigration and Nationality Act of 1952, Sec. 274(a), 66 Stat. 228, 8 U.S.C. 1324(a)	2

Miscellaneous:

6 Wigmore, *Evidence* (3d ed.) § 1819	9

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 824

BUCK WILCOXSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Pet. App. 4-12) are not yet reported. The memorandum opinion of the district court (R. 14-28) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1956 (Pet. App. 2) and a petition for rehearing was denied on March 8, 1956 (Pet. App. 3). The petition for a writ of

certiorari was filed on April 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the taking of the oath in English without interpretation by two witnesses, who later testified in Spanish through an interpreter, invalidated petitioner's conviction where the trial court found that the witnesses knew enough English to understand the nature of the oath and petitioner, who knew the capacity of the two witnesses for understanding the English language, failed to call the matter to the attention of the trial court until after the trial was completed.

2. Whether the attorney-client privilege was violated by requiring petitioner to testify at his trial about questions he directed his attorney to ask a witness at a preliminary hearing upon the charges later embodied in the indictment.

STATUTE INVOLVED

Section 274(a) of the Immigration and Nationality Act of 1952, 66 Stat. 228, 8 U.S.C. 1324(a) provides:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United

States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of

this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

STATEMENT

A two-count indictment charged petitioner with violations of 8 U. S. C. 1324(a) (*supra*), by having transported two aliens, Inocente Ortiz and Herminio Porras, into and through the State of New Mexico with the knowledge that each had entered the United States in violation of the law and that their last entry had occurred less than three years prior thereto (R. 3-4). A jury found petitioner guilty on both counts (R. 7). He was fined $500 on each count and sentenced to eighteen months under count one and three years under count two, the latter sentence being suspended (R. 12-13). On appeal, the judgment was affirmed, one judge dissenting (Pet. App. 2).

The evidence adduced by the government established that petitioner contacted Ortiz and Porras, who lived near the Mexican border on the Rio Grande, and induced them to cross to the United States and go with him to his ranch in Grants, New Mexico, as hired hands. He assured them that he was with the Immigration Service and that they would have no trouble in spite of the fact that they were aliens illegally in this country (R. 38-50, 66-73). Petitioner admitted hiring the aliens, but contended that he thought they were American citizens (R. 171).

1. The facts relevant to the issue raised concern-

ing the oath given Ortiz and Porras may be summarized as follows:

Ortiz and Porras took their oath as witnesses en masse with all the other witnesses at the commencement of the trial, and in the presence of petitioner and his attorney (R. 30, 32). The oath was administered in English in the front of the courtroom while the witnesses held aloft their right hands (R. 30). The trial court's attention was not directed to the need of an interpretation of the oath for Ortiz or Porras. When they subsequently gave their testimony an interpreter was used (R. 38, 66). In answer to questions on cross-examination directed to their educational background, both Ortiz and Porras stated that they could not speak English (R. 50, 74). In answer to a question on direct examination as to the language he and petitioner spoke during their conversation, Ortiz stated he spoke only Spanish and knew no English (R. 70-71).

After the jury had brought in their verdict of guilty, petitioner moved for a new trial on the ground, *inter alia,* that the oath had not been interpreted to Porras or Ortiz and that the record showed they could not speak, understand, or read English (R. 8). Petitioner and two of his attorneys signed affidavits that at no time during the trial were they aware that the witness oath had not been interpreted to these witnesses (R. 9, 11). In overruling the motion (R. 14-24), the trial judge found that in the light of all of the circumstances, the evidence, and his own observation of the wit-

nesses, both Ortiz and Porras knew enough English to comprehend that they were being sworn and that they understood the nature and consequences of the oath (R. 24). The trial judge pointed out that there was no affirmative evidence or affidavits to show that the witnesses did not understand the nature of the oath that was administered to them (R. 17). He referred to the fact that in New Mexico the services of an interpreter are frequently requested by many witnesses who understand English to a considerable extent, but prefer to testify in the language most familiar to them (R. 18). He noted that the witness Ortiz frequently answered a question before it was interpreted for him, that Porras had worked in the United States at various times, and that both witnesses had been in a United States court before (R. 18, 19). In affirming the conviction, the majority of the Court of Appeals, assuming without decided that petitioner's contention was correct that the witnesses in effect were not sworn at all, found that the right to seek a new trial on that ground was waived by petitioner when neither he nor his attorneys, who were all present when the oath was given and knew the capacity of the witnesses to speak English, informed the court of the need for an interpretation of the oath until after the trial had been completed (Pet. App. 9-10). Judge Murrah dissented on this issue (Pet. App. 11-12).

2. The facts relevant to the claim that the attorney-client privilege was violated (Pet. 11-15) may be summarized as follows:

During the cross-examination by the prosecution, petitioner was asked if he had directed his attorney to ask certain questions of a witness at a preliminary hearing before the United States Commissioner in connection with this case, and why he had wanted those questions asked (R. 178-186). Over objection by his counsel, he was required to answer (R. 179, 181-182). Petitioner then stated that he had directed the questions to be asked, that they were asked, and that his purpose in so doing was to ascertain how far the witness would go in testifying falsely (R. 178-186).

The Court of Appeals found that the communication between petitioner and his attorney was intended to be immediately repeated to the witness in the form of questions and therefore was not a confidential communication within the purview of the rule protecting communications between client and attorney (Pet. App. 6-7).

ARGUMENT

In view of the detailed findings of the trial judge that both Ortiz and Porras knew enough English to understand the nature of their oath (R. 15-24), we believe that the Court of Appeals decided, and that petitioner is seeking to raise here (Pet. 8-9), an academic question as to whether petitioner, by his silence, waived his right to move for a new trial on the ground that the witnesses were in effect unsworn. The Court of Appeals did not overrule the findings of the district court, but merely assumed, for the purposes of its decision, that the witnesses were not sworn at all (R. 14-24). The

conclusions of the trial judge, based upon his own observation of the witnesses on the stand, are entitled to controlling weight. The ceremony of taking the oath, with the lifting of the hand, is so well known that it is very unlikely that the witnesses would not have understood that they were being sworn, particularly since, as the trial judge noted, both witnesses had been in court before (R. 19). In addition, it was pertinent that one witness, during his testimony, answered questions before they were interpreted, and that the other had worked in the United States before (R. 18-19). A very slight knowledge of English (which would not be inconsistent with their need for an interpreter or their denials of knowledge of the language) would be sufficient for them to understand the general nature of the oath.

In any event, the majority decision below was correct in holding that petitioner waived his right to a new trial, on the ground that the witnesses did not understand the oath, by failing to raise the issue until the trial was over (Pet. 8-9). As the Court of Appeals observed, the motion for the new trial, where the issue was raised for the first time, was not based upon knowledge obtained after completion of the trial (Pet. App. 9). Petitioner does not deny this and says only that he and his attorneys were not "actually aware of the omission until after the trial" (Pet. 8). Thus the Court of Appeals did not rule contrary to the cases cited by petitioner, which hold that failure to administer the oath to a witness for the prosecution in a criminal case requires a

new trial where the defect is not known to either the defendant or his attorneys until after the trial (Pet. 9). Only three cases cited by petitioner present any conflict in viewpoint with this decision: *Hawks* v. *Baker,* 6 Me. (Greenleaf) 72, 74; *People* v. *Fisher,* 182 App. Div. 301, 169 N. Y. S. 729, 732, reversed on other grounds, 223 N. Y. 459, 119 N. E. 845; and *Langford* v. *United States,* 4 Ind. T. 567, 76 S. W. 111. Although differing on the facts, these cases do put the burden entirely on the person offering the witness to see that he is sworn. Of these three cases, only *Langford,* decided by the Court of Appeals of the Indian Territory in 1903, is in any sense a federal decision, and it does not represent the type of conflict in the federal courts that warrants review by this Court.

On the other hand, an array of authorities supports the position taken by the Tenth Circuit in this case. See *e. g., Beausoliel* v. *United States,* 107 F. 2d 292, 293 (C. A. D. C.); *State* v. *Hope,* 100 Mo. 347, 13 S. W. 490, 492; *Moore* v. *State,* 96 Tenn. 209, 33 S. W. 1046, 1048-1049; *Barnes* v. *State,* 61 Tex. Cr. 37, 133 S. W. 887, 891; *St. Louis, Iron Mountain & Southern Railroad Co.* v. *Hairston,* 125 Ark. 314, 188 S. W. 838, 839; *State* v. *Doud,* 190 Ore. 218, 225 P. 2d 400, 408-410; *Brenton State Bank* v. *Heckmann,* 233 Iowa 682, 7 N. W. 2d 813, 814-815; *State* v. *Melancon,* 163 La. 435, 112 So. 37, 38. See also 6 Wigmore, *Evidence,* (3d ed.) § 1819.

The testimony of an unsworn witness who has been subjected to the rigors of cross-examination, does not strike such a blow at due process that it

warrants the expense and delay of a new trial. Many rights are lost by laches and negligence, and it is reasonable that the right to have witnesses sworn should be numbered as one of them.

2. Petitioner suggests that the decision of the Court of Appeals, holding that there was no violation of the relationship between attorney and client, is in direct conflict with decisions of this Court in *Blackburn* v. *Crawford,* 3 Wall. 175, 192, 193; *Chirac* v. *Reinicker,* 11 *Wheat.* 280, 294, and *Alexander* v. *United States,* 138 U. S. 353, 357-358. These cases, involving different factual situations, state the general proposition of law that communications between client and attorney are privileged, but *Blackburn* itself recognizes that not all such communications are protected. This case is an example of the latter type.

Petitioner on cross-examination was not asked to reveal any facts or information he gave to his attorneys. He was asked if he directed his attorney to ask questions of a witness as to whether he mailed a letter (R. 178), how many people were in the car (R. 179), and when the car was stuck in the mud (R. 179-180). Petitioner obviously intended the questions he directed his attorney to ask to be immediately revealed through his attorney to the witnesses and the others present at the hearing. The questions were asked, they are a matter of public record, and thus do not bear a stamp of confidentiality, which petitioner concedes is a basic factor in deciding whether the privilege covers a

communication between attorney and client (Pet. 12).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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MAY, 1956.

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